

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
DARIUS AND IRINA KASPARAITIS	:	ORDER
	:	DTA NO. 819395
for Redetermination of a Deficiency or for Refund of	:	
New York State and New York City Personal Income	:	
Tax under Article 22 of the Tax Law and the New York	:	
City Administrative Code for the Years 1997, 1998	:	
and 1999.	:	

Petitioners, Darius and Irina Kasparaitis, c/o Gandler, 878 Ridge View Way, Franklin Lakes, New Jersey 07417, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 1997, 1998 and 1999.

On March 17, 2003, the Division of Tax Appeals issued to petitioners a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On April 8, 2003, petitioners' attorney, Anthony J. Carbone, Esq., sent a letter to the Division of Tax Appeals in opposition to the Notice of Intent to Dismiss Petition. On April 16, 2003, the Division of Tax Appeals received a letter and documents from Barbara G. Billet, Esq. (John E. Matthews, Esq., of counsel) on behalf of the Division of Taxation ("Division") in support of the Notice of Intent to Dismiss Petition. After due consideration of the pleadings, the letters and the documents received from the parties, Gary R. Palmer, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioners timely filed their petition following the issuance of the conciliation order.

FINDINGS OF FACT

1. On November 23, 2001 the Division issued to petitioners a notice of deficiency imposing New York State and New York City personal income taxes plus interest for the years 1997, 1998 and 1999.

2. Petitioners filed a timely request for a conciliation conference with the Bureau of Conciliation and Mediation Services (“BCMS”) in protest of the notice of deficiency.

3. A conciliation conference was held on July 11, 2002, and a conciliation order was issued to petitioners on November 22, 2002 denying the request and sustaining the statutory notice.

4. A petition was filed in protest of the conciliation order by petitioners’ representatives on February 21, 2003.

5. On March 17, 2003, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioners and their representatives, with a copy to the Division. The notice states:

You are hereby notified of our intent to dismiss the petition in the above referenced matter.

Pursuant to § 170.3-a(e) of the Tax Law, a petition must be filed within ninety days from the date a Conciliation Order is issued.

The Conciliation Order was issued on November 22, 2002 but it appears the petition was not filed until February 21, 2003 or ninety-one days later.

Pursuant to § 3000.9(a)(4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, the parties shall have thirty days from the date of this Notice to submit written comments on the proposed dismissal.

6. On April 8, 2003 Mr. Carbone, on petitioners' behalf, sent a letter to the Division of Tax Appeals acknowledging receipt of the Notice of Intent to Dismiss Petition, explaining that petitioners had a different representative at the "conciliation stage," and stating that he, Mr. Carbone, was not yet in possession of the envelope which contained the conciliation order and bearing the date it was mailed. Mr. Carbone then proceeded to point out that even if the Division were to establish that the petition was filed untimely, petitioners were not without a remedy in that they could pay the deficiency and apply for a refund. In the event the refund was denied, then petitioners could request a conciliation conference or file a petition for a hearing with the Division of Tax Appeals. He expressed the hope that such "duplicative proceedings" would not be required and that petitioners be given the opportunity to present their case on the merits pursuant to the petition they already have filed.

7. On April 16, 2003 the Division filed the affidavit of John E. Matthews, Esq. in support of the Notice of Intent to Dismiss Petition along with the affidavits of Division employees Carl DeCesare and Daniel LaFar. Attached to the affidavit of Mr. DeCesare is a five-page Assessments Receivable Certified Record for Non-Presort Mail, commonly known as a certified mail record ("CMR"), along with other documents relating to the mailing of conciliation orders by BCMS. The affidavit of Mr. DeCesare states that he is the Assistant Director of BCMS and sets forth the Division's general procedure for preparing conciliation orders. The affidavit of Mr. LaFar states that he is the Principal Mail and Supply Clerk in the Division's Mail Processing Center and attests to the regular procedures followed by the Mail Processing Center for

delivering outgoing certified mail to branches of the United States Postal Service (“USPS”).

Findings of Fact “8” through “13” are taken from the affidavits of Mr. DeCesare and Mr. LaFar.

8. All conciliation orders mailed within the United States are sent by certified mail. The Data Management Services Unit of BCMS prepares the final copy of each conciliation order and its accompanying cover letter. The computer-generated conciliation order and cover letter are predated with the anticipated date of mailing. Using electronically stored data, the Advanced Function Printing Unit (“AFP”) assigns a certified mail control number to each order and produces a cover sheet that contains the following information: the BCMS return address, the anticipated date of mailing, the taxpayer’s name and mailing address, the control number assigned by BCMS (the “CMS” number), the certified mail control number and a corresponding certified mail control number bar code. The AFP Unit produces the computer-generated CMR which is a listing of taxpayers and representatives to whom conciliation orders are to be sent by certified mail on a particular day. The certified mail control numbers are recorded on the CMR under the heading “CERTIFIED NO.”

9. The Data Management Services Unit forwards the conciliation order and cover letter to BCMS where they are reviewed and signed by the appropriate conciliation conferee. The conferee then forwards the signed conciliation order and cover letter to a clerk assigned to process conciliation orders. The AFP Unit forwards the CMR and cover sheet to a printer located in BCMS where these documents are delivered to the BCMS clerk assigned to process conciliation orders.

10. The BCMS clerk associates each cover sheet provided by the AFP Unit with the appropriate conciliation order and cover letter. The clerk verifies that the information on the

cover sheet, the conciliation order and the cover letter are the same. All three documents are then folded and placed in a three-windowed envelope which allows the BCMS return address, the certified mail control number, the bar code and the name and address of the taxpayer to show.

11. The CMR, along with the envelopes to be mailed that day, are picked up in the BCMS office by an employee of the Division's Mail Processing Center. A staff member weighs and seals each envelope and places postage and fee amounts on the envelopes. Thereafter, a mail processing clerk counts the envelopes and verifies the names and certified mail numbers against the information contained in the CMR. Once the envelopes are stamped, a member of the Mail Processing Center staff delivers them to a branch of the USPS in the Albany area. A postal employee affixes a postmark and his or her initials to the CMR as evidence of receipt by the USPS. The CMR becomes the Division's record of receipt by the USPS for the items of certified mail listed on that document. In the Division's ordinary course of business, the CMR is picked up at the post office the next business day and delivered to the originating office by a Mail Processing Center staff member.

12. In his affidavit Mr. DeCesare states that the copy of the five-page CMR attached to his affidavit is a true and accurate copy of the original. Portions of the CMR have been redacted to protect the confidentiality of the taxpayers listed thereon. The CMR originally contained a list of 47 conciliation orders to be issued by the Division on November 22, 2002. Of these 47 pieces of mail, 3 were segregated from the 47 due to some form of defect and held for issuance at a future date. References to these 3 conciliation orders were redacted from the CMR leaving a total of 44 pieces of mail listed and received at the USPS on November 22, 2002. The 44 certified mail

control numbers on the CMR do not run consecutively. Petitioners' names and address appear on page 1 of the CMR with the certified mail control number 7104 1002 9739 0142 1542 appearing next to their names. There is no indication on the face of the CMR or in the affidavits that a copy of the conciliation order was mailed to Joel Brill, CPA, the representative of petitioners named in the order.

13. Each of the five pages of the CMR is postmarked with the date, November 22, 2002, by the Stuyvesant Plaza branch of the USPS in the Albany, New York area. At the bottom right of page 5 of the CMR, the number "44" is handwritten and circled next to the initials of the USPS employee and below the area marked "total pieces received at post office." The fact that a Postal Service employee wrote the number of pieces listed on the CMR to indicate the total number of pieces of mail received at the post office was established through the affidavit of Mr. LaFar based on his knowledge that the Division's Mail Processing Center requested that Postal Service employees either circle the total number of pieces of mail received or indicate the total number of pieces received by writing the total number of such pieces on the CMR.

CONCLUSIONS OF LAW

A. A petition contesting a notice of deficiency of personal income tax due must be filed within 90 days after the date of mailing of the notice (Tax Law § 689 [b]). In the alternative, a taxpayer may request a conciliation conference in BCMS. The time period for filing such a request is also 90 days (*see*, Tax Law § 170[3-a][a]). A conciliation order is binding on both the Division and the taxpayer unless the taxpayer petitions for a hearing within 90 days after the conciliation order is issued (Tax Law § 170[3-a][e]). The filing of a petition within this time frame is a prerequisite to the jurisdiction of the Division of Tax Appeals which has no authority

to consider a petition which is not filed within 90 days of the issuance of a conciliation order (*Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002).

B. Where the taxpayer files a petition, but the timeliness of the petition is at issue, the Division has the burden of proving proper mailing of the conciliation order (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). The mailing evidence required of the Division is twofold: first, there must be proof of a standard procedure used by the Division for the issuance of orders by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*).

The affidavits of the two Division employees, Carl DeCesare and Daniel LaFar, provide adequate proof of the Division's standard mailing procedure for the mailing of conciliation orders like the one mailed to petitioners by certified mail. The affidavits generally describe the various stages of producing and mailing conciliation orders and, in addition, attest to the authenticity and accuracy of the copies of the conciliation order and the CMR submitted as evidence of actual mailing. These documents establish that the general mailing procedures described in the DeCesare and LaFar affidavits were followed with respect to the conciliation order issued to petitioners. Petitioners' names and address appear on the first page of the certified mail record which bears a USPS postmark dated November 22, 2002. There are 44 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated that he or she received a total of 44 items for mailing. In short, the Division has

established that it mailed the conciliation order to petitioners by certified mail on November 22, 2002, and 91 days before the February 21, 2003 mailing date of the petition.

C. The record includes a copy of petitioners' request for a conciliation conference signed by Joel Brill, CPA, which was indated by BCMS on February 5, 2002, along with a copy of a power of attorney signed by petitioners on January 19, 2002 appointing Mr. Brill as their representative. There is nothing in the record to indicate that Mr. Brill's status as petitioners' representative was terminated at any time prior to the execution of a new power of attorney on February 21, 2003, when Mr. Kasparaitis alone signed the new power of attorney appointing his present representatives.

D. *Matter of Nicholson* (Tax Appeals Tribunal, June 12, 2003), is a case where the Tribunal issued a Notice of Intent to Dismiss Exception on the grounds that petitioner's notice of exception was not filed within 30 days of the issuance of the Administrative Law Judge's order denying petitioner's motion to vacate a default determination as required by Tax Law § 2006(7). The notice was withdrawn by the Tribunal after it became aware that petitioner's representative had not been issued a copy of the Administrative Law Judge's order. The Tribunal noted that although the Tax Law does not specifically provide for the service of a statutory notice on a taxpayer's representative, the Court of Appeals in *Matter of Bianca v Frank* (43 NY2d 168, 401 NYS2d 29), held that once a representative appears in a matter, a statute of limitations cannot begin to run unless that representative is served with a copy of the determination or notice sought to be reviewed. Because Mr. Brill was not shown to have been issued a copy of the conciliation order dated November 22, 2002, the 90-day period in which to protest that order has not yet begun to run.

E. On the Division of Tax Appeals' own motion the Notice of Intent to Dismiss Petition is withdrawn and the petition of Darius and Irina Kasparaitis for a hearing on the merits is accepted. A hearing will be scheduled by the Division of Tax Appeals in due course.

DATED: Troy, New York
July 17, 2003

/s/ Gary R. Palmer
ADMINISTRATIVE LAW JUDGE